MOHD BAKRI BELAHO A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
MOHD GHAZALI YUSOFF JCA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
[CRIMINAL APPEAL NO: B05-58-2000]
8 OCTOBER 2007 C

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction and sentence, appeal against - Whether prima facie case made out - Standard of proof - Mens rea - Issues of evidence - Credibility of witness - Defence - Cumulative effect of circumstantial evidence - Whether case proven beyond reasonable doubt* D

CRIMINAL PROCEDURE: *Trial - Prima facie case - Whether made out at close of prosecution's case - Maximum evaluation of evidence - Standard of proof* E

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Whether made out at close of prosecution's case - Maximum evaluation of evidence - Standard of proof*

EVIDENCE: *Witness - Credibility - Witness for the prosecution - Whether witness's reaction after witnessing crime unusual but reasonable - Whether evidence of witness erroneously accepted - Whether witness himself had opportunity to commit offence* F

EVIDENCE: *Adverse inference - Whether presumption arose - Failure to call material witnesses - Whether there was deliberate suppression of evidence - Evidence Act 1950, s. 114(g)* G

EVIDENCE: *Presumption - Adverse inference - Whether presumption arose - Failure to call material witnesses - Whether there was deliberate suppression of evidence - Evidence Act 1950, s. 114(g)* H

EVIDENCE: *Deposition - Absent witness - Deposition tendered by person who could not be found or traced - Whether admission of such deposition justified - Evidence Act 1950, s. 32*

CRIMINAL PROCEDURE: *Trial - Defence - Explanation of accused - Denial - Shifting of blame - Whether explanation incoherent and inconsistent - Whether clear and obvious fabrication by accused* I

A ***CRIMINAL PROCEDURE:*** *Defence - Explanation of accused - Denial - Shifting of blame - Whether explanation incoherent and inconsistent - Whether clear and obvious fabrication by accused*

CRIMINAL PROCEDURE: *Prosecution - Prosecution's case -*
B *Whether accused's defence raised reasonable doubt on prosecution's case - Totality of evidence - Whether conviction of accused secure*

EVIDENCE: *Circumstantial evidence - Securing conviction on - Cumulative effect - Conduct of accused - Whether case against accused proved beyond reasonable doubt - Whether conviction of accused secure*
C

This was an appeal by the appellant against his conviction of the murder of one Aminah Bahrah ('deceased') and his sentence to death in accordance with s. 302 of the Penal Code ('Code'). The offence was committed at a house ('said house') containing five
D rooms, of which three were rented out separately by the owner, one Jamaliah Mohd Yusuff ('SP8'). The appellant was a tenant in one of the rooms while the deceased and her family, namely, her husband named Samsudin and her two-year old child, were tenants in another. One Ahmad Jumah ('SP9') was also a tenant
E in one of the rooms and it was his testimony that connected the appellant to the murder. He averred that, on the day of the incident, he saw the appellant crouching over the deceased in the lounge area of the said house with his right hand on her throat and a kitchen knife in his left hand. Fearing for his life, he climbed
F out through the window in his room and fled to a nearby hill. Upon his return to the said house later, he saw the deceased lying on the floor of the kitchen dressed in her underwear. There were bloodstains on the kitchen floor and lounge area, and the appellant was nowhere to be seen. SP9 then proceeded to SP8's
G food stall, where he worked as a helper, but did not inform her about the incident. In her evidence, SP8 stated that, upon being informed by a neighbour that the deceased's child was crying very loudly, she went to the said house and found the deceased lying on the bloodstained kitchen floor. She consequently lodged a
H police report and the investigating officer of the case, one Chief Inspector Mohd Fazley Abdul Rahman ('SP11'), went to the scene of the crime and found the lifeless body of the deceased covered by a green towel. He noticed that there were wounds on the deceased's neck and he later found a knife without its handle
I in the kitchen of the said house. He also found a knife and some

soaked clothing in a pail in the bathroom. The post mortem conducted on the deceased indicated that she died as a result of a fatal haemorrhage resulting from injuries caused by a combination of incise and stab wounds. The appellant was arrested the next day in Kota Tinggi, Johor and subsequently brought to Kuala Lumpur where, upon being examined, was found to have scratch marks on his knees and thigh and a laceration wound on the palm of his hand.

At the conclusion of the case for the prosecution, the trial judge found that a *prima facie* case had been made out against the appellant on the offence charged and called upon the defendant to enter his defence. The appellant elected to give evidence on oath and at the conclusion of the trial, the trial judge found that the prosecution had proved its case beyond reasonable doubt and found the appellant guilty of murder. The appellant's grounds of appeal were as follows: (i) the trial judge failed to undertake a maximum evaluation of the evidence adduced at the close of the case for the prosecution and had applied the wrong standard of proof; (ii) with regard to the evidence of SP9, the appellant pointed out that the trial judge was of the view that SP9's reaction upon witnessing the crime was unusual, namely, he left the said house through the window of his room and ran away to hide and when he returned, after seeing the body of the deceased in the kitchen, he went to work at SP8's stall but did not inform SP8 or anyone else about the incident. In relation to the incident, it was argued there was no evidence that the place where the incident took place was lighted and, hence, the trial judge erred in accepting SP9's evidence that he saw what transpired at the material time. In the same vein, the appellant argued that the trial judge was wrong in accepting the evidence of SP9 when SP9 had access to the place of the incident and, thus, the opportunity to commit the offence himself; (iii) in respect of the non-calling of Samsudin and one Jumain, a visitor that Samsudin brought to the house on the day of the incident, by the prosecution, the trial judge erred in not applying the presumption under s. 114(g) of the Evidence Act 1950 ('Act'); and (iv) the trial judge never considered the appellant's defence and just concluded that his defence was based on lies and did not raise any reasonable doubt on the prosecution's case.

Held (dismissing the appeal, and affirming the conviction and sentence)

Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

(1) With regard to the non-calling of Samsudin and Jumain as witnesses for the prosecution, SP11 testified that he had, in the course of the investigation, recorded a statement from Samsudin but was subsequently unable to serve a subpoena on him as he could not be traced. One Inspector Mohd Razali Taib also testified that he was unable to trace Samsudin. In relation to Jumain, SP11 said he was informed earlier that Jumain had gone back to Tanjong Malim and that he did not carry out an investigation on Jumain. In such circumstances, s. 114(g) of the Act would not apply. Section 114(g) of the Act provides "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". The simple reason why the prosecution did not call Samsudin to testify or even offer him as a witness for the defence was that he could not be traced. The police could not serve a subpoena on him to compel his attendance in court. Further, there was no reason why the prosecution would want to withhold him from coming to court to testify. At the time of the incident, SP9 had seen only the appellant with the deceased. The appellant himself said that when he got up in the morning, Samsudin had gone to work since he was not in the lounge. In respect of Jumain, SP11 testified that he did not carry out an investigation on the former, which would denote that SP11 had never met Jumain in the course of his investigation and had, hence, never recorded a statement from him. Unless the appellant could show there was deliberate suppression of evidence, s. 114(g) of the Act could not be raised. (paras 27, 28 & 29)

(2) As to SP9's evidence, the appellant, in the court below, neither suggested as a defence during the case for the prosecution that SP9 had the opportunity to commit the offence himself nor raised such a defence specifically or otherwise during the defence's case. What was clear from the notes of evidence and the minutes of the proceedings was that there was the lack of cross-examination of witnesses by the defence suggesting that SP9 could have been the person who murdered the deceased as he had the opportunity to do so. Furthermore, that SP9 could have been the person who committed the offence was suggested for the first time only at

this appeal and not at the trial. In the court below, the appellant testified that he heard Jumain's voice coming from the direction of the deceased's room that morning and that the wound on his hand was inflicted by a knife used by Jumain. This seemed to be that the appellant was suggesting that it was Jumain who had the opportunity to inflict the injuries on the deceased. (para 31)

(3) There was no merit to the appellant's submission that the trial judge never considered his defence. In his grounds of judgment, the trial judge dealt at length with the evidence of SP9. He expressed his view that SP9's reaction of running away, after seeing what had transpired at the said house, was a bit unusual but reasonable. He was also of the view that SP9 was not a very intelligent person and in the circumstances, the trial judge opined that his reaction of running away was understandable. (para 32)

(4) The question that the trial judge had to answer at the conclusion of the trial was whether the totality of the evidence led to the irresistible conclusion that it was the appellant who had committed the crime. On the evidence shown, the trial judge was correct in arriving at the decision that he did when he called on the appellant to enter his defence. On the face of the record at the close of the case for the prosecution, it was clear that a case under s. 302 of the Code had been made out against the appellant. The evidence linked the appellant to the act of killing and established the offence charged. At the conclusion of the trial, the evidence, in its totality, confirmed that it was the appellant who had murdered the deceased. No miscarriage of justice had occurred in this case. (paras 33 & 34)

Per Suriyadi Halim Omar JCA (concurring):

(1) On the facts, combining the effect of the weapons used in the incident, the nature of the wounds inflicted, the parts of the body on which the injuries were inflicted and the probability of death resulting being high, everything pointed to an intention to cause death or injury sufficient in the ordinary course of nature to cause death. From the severity of the wounds, the appellant could not come forward and say that he was unaware that they would in all likelihood have caused death, let alone that they were accidental or unintended. (para 70)

(2) There was no reason to disagree with the overall findings and views of the presiding judge regarding SP9. The court had considered the mental capacity of SP9 and had concluded that he was a person of below average intelligence. There was no reason why the testimony of a person of limited intelligence could not be accepted (apart from the factor of timidity). What was important was that his veracity and credibility had withstood the test of the appellant's cross-examination. That being so, what SP9 had heard and saw, especially that part about seeing the appellant holding a knife in his left hand with his right hand holding the deceased's neck, had pinned the appellant to the charge. (para 74)

(3) At the time when the murder was being committed, there was no one else in the said house, as confirmed by SP9 and corroborated further by the deposition of the deceased's husband, Samsuddin. This deposition was tendered pursuant to s. 32 of the Act and was a statement of a relevant person who could not be found. From the testimonies of police witnesses, it had been clarified that Samsuddin could not be found as he had been kidnapped by unknown persons. Perhaps conceding to the truth of that clarification, and that all the preconditions had been satisfied, it was no surprise that no objection was registered by the appellant, as reflected by the notes of the proceedings. A scrutiny of the evidence adduced showed that there was sufficient justification for the admission of the Samsuddin's deposition under s. 32 of the Act. *DA Duncan v. PP* (foll). The contents confirmed that on the same morning, before the murder, he and Jumain had left the said house for work. With everyone out of the way, apart from the unexpected hidden presence of SP9 and the deceased's two-year old child, the appellant thus had the opportunity to commit the offence. (paras 77, 78 & 79)

(4) The subsequent conduct of the appellant of absconding to the south, hundreds of miles away from the scene of the crime, unfortunately to be arrested at Kota Tinggi, Johor Bahru merely strengthened the prosecution's case. By so absconding, it was obvious that the appellant had attempted to distance himself from the scene of the crime. Although the act would not suffice to convict him, it would be relevant since it was indicative of a guilty mind. *Adikanda Das v. State of Orissa* (refd). With such cumulative evidence, the High Court had correctly found that a *prima facie* case had been established at the end of the prosecution's case. (paras 80, 81 & 82)

(5) At the defence stage, the appellant's defence was incoherent. He attempted to implicate everyone in the incident, for instance Jumain, whom the appellant alleged had wanted to stab him. In the earlier part of his own testimony, the appellant had exonerated Jumain's culpability when he said that Samsudin and Jumain had already gone to work when he woke up that morning. He had also said that the killer was "unknown to him". As the hearing went on, he tried to implicate Jumain, perhaps forgetting that he made the above statement clarifying that Jumain had left (which tallied with Samsudin's documented deposition affirming that he went out of the said house with Jumain earlier). At the tail end of his testimony, the appellant accused the now "identifiable" Jumain as the person who wanted to stab him (again contradicting himself when he earlier stated that he did not know the killer). It was thus plain and obvious that lying and switching stories were second nature to the appellant. (paras 83 & 84)

(6) What was undeniable was that on that fateful day and time, the appellant, by his very own admission, was in the said house when the commission of the offence was in progress. By all accounts, he had ironically strengthened the prosecution's case, not merely by that admission, but also by his plainly obvious attempts to push the blame onto someone else. This defence of outright denial had unfortunately caused him to 'forget' to deal with the prosecution's other strands of evidence, thus resulting in him failing to dent the prosecution's case. He never even explained what he was doing crawling on top of the deceased with a knife in hand. He did, at one stage, attempt to explain why he had bruises all over his body, in that Jumain caused them, but that explanation was inconsistent with the other evidence. To put it bluntly, Jumain could not have caused the injuries since he was never present during the incident. He had already left for work as confirmed by Samsudin's deposition, SP9's exonerating testimony and the appellant's own admission. (para 87)

(7) Although SP9 did not see the act of the appellant causing the injuries leading to the eventual death of the deceased, the cumulative effect of the total circumstantial evidence pointed unerringly to the appellant's guilt. *Tulshiram v. State of Maharashtra* (foll). At the stage of the defence, the appellant had squandered away his life when he submitted the most improbable defence in the form of a mere denial and shifting the blame to Jumain. Yet all the evidence showed that Jumain

A was not in the said house at the time of the offence. This defence, when tested against the totality of the evidence adduced by the prosecution, was at best a desperate attempt by the appellant to extricate himself from an impossible position. All the evidence, when bound together, inclusive of
B the most innocuous strand like the return of SP9 to the said house not too long thereafter where he saw the deceased's body in the kitchen, irresistibly pointed to the guilt of the appellant. The last person SP9 saw with the deceased was the appellant. From the totality of the evidence, the
C prosecution had proven its case beyond reasonable doubt at the end of the trial. (paras 89, 90 & 91)

Bahasa Malaysia *Translation Of Headnotes*

D Ini adalah rayuan oleh perayu terhadap sabitannya atas kesalahan membunuh seorang Aminah Bahrah ('simati') dan hukuman mati yang dijatuhkan ke atasnya di bawah s. 302 Kanun Keseksaan ('Kanun'). Kesalahan dilakukan di sebuah rumah ('rumah tersebut') yang mengandungi lima bilik, di mana tiga darinya disewakan
E secara berasingan oleh pemiliknya, seorang Jamaliah Mohd Yusuff ('SP8'). Perayu adalah penyewa salah satu dari bilik-bilik tersebut sementara simati dan keluarganya, iaitu suaminya yang bernama Samsudin dan anaknya yang berumur dua tahun, adalah penyewa satu bilik lain. Seorang Ahmad Jumah ('SP9') juga merupakan
F penyewa salah satu dari bilik-bilik dan testimoni beliaulah yang mengaitkan perayu dengan pembunuhan. Beliau menyatakan bahawa pada hari kejadian beliau melihat perayu berada di atas badan simati di ruang tamu rumah tersebut dengan tangan kanannya mencekik leher simati sementara tangan kirinya
G memegang sebilah pisau dapur. Bimbangkan keselamatan dirinya, beliau memanjat tingkap biliknya dan lari ke bukit berdekatan. Sekembalinya beliau ke rumah, beliau melihat simati terbaring di lantai dapur dengan hanya berseluar dalam. Terdapat kesan darah pada lantai dapur serta ruang tamu, sementara perayu pula hilang
H entah ke mana. SP9 kemudian pergi ke gerai makan SP8, di mana beliau bekerja sebagai pembantu, tetapi tidak memberitahu SP8 tentang kejadian. Dalam keterangannya, SP8 menyatakan bahawa, setelah diberitahu oleh jirannya bahawa anak simati telah meraung dengan kuatnya, beliau pergi ke rumah tersebut dan mendaparti
I simati terbaring di atas lantai dapur yang dipenuhi dengan kesan darah. Berikutnya beliau telah membuat laporan polis dan pegawai penyiasat kes, seorang Cif Inspektor Mohd Fazley Abdul Rahman ('SP11'), pergi ke tempat kejadian dan melihat mayat simati

diselimuti dengan tuala berwarna hijau. Beliau juga melihat kesan-kesan luka pada leher simati dan kemudiannya menjumpai sebilah pisau tanpa ulu di dapur rumah tersebut. Seterusnya beliau melihat sebilah pisau dan beberapa helai pakaian basah di dalam baldi di bilik air. Post mortem yang dijalankan ke atas simati menunjukkan bahawa beliau mati kerana pendarahan fatal berpunca dari kecederaan-kecederaan yang diakibatkan oleh kombinasi irisan dan tikaman. Perayu ditangkap keesokan harinya di Kota Tinggi, Johor dan berikutnya dibawa ke Kuala Lumpur di mana, setelah diperiksa, didapati terdapat kesan-kesan cakaran pada lutut dan pehanya serta kesan-kesan luka pada tapak tangannya.

Di penutup kes pendakwaan, hakim bicara mendapati bahawa kes *prima facie* telah dibuktikan terhadap perayu seperti pertuduhan dan memanggil perayu untuk membela diri. Perayu memilih untuk memberi keterangan bersumpah dan di akhir perbicaraan, hakim bicara mendapati pendakwaan telah berjaya membuktikan kes mereka di luar keraguan munasabah sekaligus mendapati perayu bersalah kerana membunuh. Alasan-alasan rayuan perayu adalah seperti berikut: (i) hakim bicara gagal membuat penilaian maksima terhadap keterangan yang dikemukakan di akhir kes pendakwaan dan telah menggunapakai standard pembuktian yang salah; (ii) berkaitan dengan keterangan SP9, perayu mengatakan bahawa hakim bicara berpendapat bahawa reaksi SP9 ketika menyaksikan jenayah adalah luar biasa, iaitu ia meninggalkan rumah tersebut menerusi tingkap biliknya dan lari untuk bersembunyi, dan bilamana beliau kembali dan melihat mayat simati di dapur, beliau terus pergi bekerja di gerai SP8 tetapi tidak memberitahu SP8 atau sesiapa pun mengenai kejadian. Berhubung dengan kejadian, dihujahkan bahawa tiada keterangan bahawa tempat di mana kejadian berlaku berlampu, dan kerana itu, hakim bicara khilaf dalam menerima keterangan SP9 bahawa beliau melihat apa yang berlaku pada waktu material. Begitu juga, perayu berhujah bahawa hakim bicara khilaf dalam menerima keterangan SP9 memandangkan SP9 mempunyai akses kepada tempat kejadian yang bererti beliau mempunyai peluang untuk melakukan kesalahan itu; (iii) Berhubung kegagalan pendakwaan memanggil Samsudin dan seorang Jumain, iaitu seorang tamu yang dibawa oleh Samsudin ke rumah pada hari kejadian, hakim bicara khilaf kerana tidak menggunapakai anggapan s. 114(g) Akta Keterangan 1950 ('Akta'); dan (iv) hakim bicara langsung tidak mempertimbang pembelaan perayu tetapi terus merumuskan bahawa pembelaannya adalah berasaskan pembohongan dan tidak membangkitkan sebarang keraguan munasabah terhadap kes pendakwaan.

Diputuskan (menolak rayuan, dan mengesahkan sabitan dan hukuman)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Berhubung kegagalan memanggil Samsudin dan Jumain sebagai saksi-saksi pendakwaan, SP11 memberi keterangan bahawa beliau telah, sewaktu menjalankan siasatannya, merekodkan kenyataan oleh Samsudin tetapi kemudian gagal menyerahkan sapina kepadanya kerana Samsudin telah menghilangkan diri. Seorang Inspektor Mohd Razali Taib juga memberi keterangan bahawa beliau gagal mengesan Samsudin. Mengenai Jumain, SP11 menyatakan bahawa beliau diberitahu sebelumnya bahawa Jumain telah kembali ke Tanjong Malim dan bahawa beliau tidak menjalankan apa-apa penyiasatan ke atas Jumain. Dalam keadaan sedemikian, s. 114(g) Akta tidak terpakai. Seksyen 114(g) Akta memperuntukkan "bahawa keterangan yang boleh dikemukakan tetapi tidak dikemukakan akan memanfaatkan orang yang memilikinya jika dikemukakan". Alasan mudah mengapa pendakwaan tidak memanggil Samsudin untuk memberi keterangan atau menawarkannya sebagai saksi kepada pembelaan adalah kerana ia tidak dapat dikesan. Polis tidak dapat menyerahkan sapina ke atasnya bagi mempastikan kehadirannya di mahkamah. Selain itu, tiada sebab mengapa pendakwaan ingin menghalangnya dari datang ke mahkamah untuk memberi keterangan. Pada masa kejadian, SP9 hanya melihat perayu dan simati. Perayu sendiri menyatakan bahawa apabila dia bangun pada paginya, Samsudin telah pergi bekerja kerana beliau tidak kelihatan di ruang tamu. Berhubung dengan Jumain, SP11 menyatakan bahawa beliau tidak membuat apa-apa penyiasatan ke atasnya, yang bererti SP11 tidak pernah berjumpa Jumain semasa menjalankan penyiasatannya, dan kerana itu, tidak pernah merekodkan apa-apa kenyataan dari Jumain. Kecuali perayu boleh membuktikan wujud usaha untuk melupuskan keterangan, s. 114(g) Akta tidak boleh dibangkitkan.

(2) Berkaitan keterangan SP9, perayu di mahkamah di bawah tidak pernah mengusulkan sebagai satu pembelaan, semasa kes pendakwaan sedang berjalan, bahawa SP9 sendiri mempunyai peluang untuk melakukan kesalahan berkenaan. Itu juga tidak dibangkitkan sebagai satu pembelaan khusus atau sebagai satu pembelaan semasa membentangkan kesnya. Apa yang jelas dari nota keterangan dan minit-minit prosiding adalah bahawa tiada

soal balas saksi-saksi oleh pihak pembelaan untuk menunjukkan bahawa SP9 mungkin orangnya yang membunuh si mati kerana beliau mempunyai peluang untuk berbuat demikian. Selain itu, kemungkinan bahawa SP9 yang melakukan kesalahan itu hanya diusulkan buat pertama kalinya di rayuan ini dan bukannya di perbicaraan. Di mahkamah di bawah, perayu menyatakan bahawa beliau ada mendengar suara Jumain yang datang dari arah bilik simati dan bahawa kecederaan ditangannya adalah berpunca dari pisau yang digunakan oleh Jumain. Ini menunjukkan perayu seolah-olah mengusulkan bahawa Jumain adalah orangnya yang mempunyai peluang untuk menyebabkan kecederaan-kecederaan ke atas simati.

(3) Tiada merit pada hujah perayu bahawa hakim bicara langsung tidak menimbang pembelaannya. Dalam penghakimannya, hakim bicara telah mengupas keterangan SP9 dengan panjang lebar. Beliau menyatakan pendapatnya bahawa reaksi SP9 dalam melarikan diri selepas melihat apa yang berlaku di rumah tersebut, walaupun agak luar biasa, masih munasabah. Beliau juga berpendapat bahawa SP9 bukanlah seorang yang amat cerdik dan dalam halkeadaan yang wujud hakim bicara merumuskan bahawa reaksinya dalam melarikan diri boleh difahami.

(4) Persoalan yang perlu dijawab oleh hakim bicara di akhir perbicaraan adalah sama ada keseluruhan keterangan membawa kepada hanya satu konklusi iaitu bahawa perayu adalah orangnya yang melakukan jenayah. Atas keterangan yang ada, hakim bicara betul dalam mencapai keputusan untuk memanggil perayu untuk membela diri. Di permukaan rekod, di akhir kes pendakwaan, jelas bahawa satu kes di bawah s. 302 Kanun telah dibuktikan terhadap perayu. Keterangan telah mengaitkan perayu dengan perbuatan membunuh dan membuktikan kesalahan yang dituduhi. Di akhir perbicaraan, keterangan, secara keseluruhannya, mengesahkan bahawa perayu adalah orangnya yang membunuh simati. Tidak berlaku salah laksana keadilan dalam kes ini.

Oleh Suriyadi Halim Omar HMR (menyetujui):

(1) Di atas fakta, dengan menggabungkan kesan dari senjata yang digunakan di dalam kejadian, sifat kecederaan-kecederaan yang dikenakan, bahagian-bahagian badan di mana kecederaan dikenakan dan kemungkinan berlaku kematian yang begitu

besar, kesemuanya menunjuk kepada niat untuk menyebabkan kematian atau kecederaan yang di dalam keadaan biasa mencukupi untuk menyebabkan kematian. Memandangkan kecederaan-kecederaan yang sebegitu parah, perayu tidak boleh datang ke depan dan menyatakan bahawa beliau tidak menyedari bahawa kecederaan-kecederaan tersebut berkemungkinan akan menyebabkan kematian, apalagi untuk menyatakan ianya tidak disengajakan.

(2) Tiada alasan untuk tidak bersetuju dengan dapatan-dapatan dan pandangan-pandangan hakim bicara pada keseluruhannya mengenai SP9. Mahkamah telah mempertimbang keupayaan mental SP9 dan merumuskan bahawa beliau adalah seorang yang mempunyai kecerdikan yang di bawah paras biasa. Tiada sebab mengapa testimoni seorang yang kurang cerdik tidak boleh diterima (selain faktor ketakutan). Apa yang penting adalah bahawa kebenaran dan kredibiliti beliau mampu menghadapi soalbalas-soalbalas perayu. Dalam keadaan sedemikian, apa yang didengar dan dilihat oleh SP9, terutama bahagian di mana beliau melihat perayu memegang pisau di tangan kanannya sementara tangan kirinya memegang leher simati, telah mengikat perayu kepada pertuduhan.

(3) Sewaktu pembunuhan dilakukan, tiada orang lain berada di rumah tersebut, seperti yang disahkan oleh SP9 dan disokong oleh deposisi suami simati, Samsuddin. Deposisi ini telah dikemukakan di bawah s. 32 Akta dan adalah merupakan satu kenyataan oleh orang yang relevan yang tidak dapat ditemui. Dari testimoni saksi-saksi polis, telah dijelaskan bahawa Samsuddin tidak dapat ditemui kerana beliau telah diculik oleh orang-orang yang tidak dikenali. Mungkin kerana bersetuju dengan penjelasan tersebut, dan bahawa semua syarat-syarat baginya telah dipenuhi, tiada bantahan disuarakan oleh perayu, seperti yang terserlah dari nota prosiding. Meneliti keterangan yang dikemukakan menunjukkan bahawa terdapat justifikasi yang mencukupi untuk menerima masuk deposisi Samsuddin di bawah s. 32 Akta. *DA Duncan v. PP* (diikuti). Kandungannya mengesahkan bahawa pada pagi yang sama, sebelum pembunuhan, beliau dan Jumain telah meninggalkan rumah tersebut untuk pergi kerja. Dengan semua orang tiada di rumah, kecuali kehadiran tersembunyi SP9 dan anak simati yang berumur dua tahun, peluang adalah terbuka kepada perayu untuk melakukan kesalahan.

(4) Tingkah laku perayu yang menyusul, iaitu dengan melarikan diri ke selatan, yang beratus-ratus batu jauhnya dari tempat kejadian, namun ditangkap juga akhirnya di Kota Tinggi, Johor Bahru hanya memperkukuhkan kes pendakwaan. Dengan melarikan diri sedemikian, jelas bahawa perayu berhasrat untuk menjauhkan dirinya dari tempat kejadian. Walaupun perbuatan itu tidak mencukupi untuk mensabitkannya, ia relevan bagi menunjukkan suatu guilty mind. *Adikanda Das v. State of Orissa* (dirujuk). Dengan keterangan-keterangan kumulatif sedemikian, Mahkamah Tinggi telah dengan betulnya mendapati bahawa satu kes *prima facie* telah dibuktikan di akhir kes pendakwaan.

(5) Di peringkat kes pembelaan, pembelaan perayu adalah tidak koheren. Beliau cuba melibatkan semua orang di dalam kejadian, Jumain umpamanya, yang dikatakan perayu ingin menikamnya. Dalam testimoni awalnya, perayu menunjukkan ketidak-bersalahan Jumain bilamana beliau mengatakan bahawa Samsudin dan Jumain sudah pun keluar bekerja apabila beliau terjaga di pagi tersebut. Beliau juga menyatakan bahawa pembunuh adalah tidak "dikenali olehnya". Di peringkat pendengaran seterusnya, beliau cuba untuk melibatkan Jumain, mungkin kerana terlupa bahawa beliau pernah membuat kenyataan di atas menyatakan Jumain sudah pun keluar (yang selaras dengan deposisi Samsudin yang didokumenkan yang mengesahkan bahawa beliau keluar dari rumah tersebut bersama Jumain sebelumnya). Di akhir testimoninya, perayu menuduh pula Jumain "yang dikenalinya" sebagai orang yang hendak menikamnya (sekali lagi menentangi dirinya sendiri yang sebelum itu menyatakan ia tidak mengenali pembunuh). Dengan itu, adalah jelas dan nyata bahawa berbohong dan mengalih-alih cerita adalah amat mudah bagi perayu.

(6) Apa yang tidak dapat disangkal adalah bahawa pada hari dan masa kejadian, perayu, berdasarkan pengakuannya sendiri, berada di dalam rumah tersebut sewaktu jenayah tersebut sedang dilakukan. Dari apa yang diceritakan, perayu sebenarnya telah memperkuatkan lagi kes pendakwaan, bukan semata-mata kerana pengakuannya itu, tetapi juga melalui usaha-usahanya untuk mengalih kesalahan kepada orang lain. Pembelaan yang berupa penyangkalan semata-mata ini, malangnya, membuatkan beliau "lupa" untuk menangani keterangan-keterangan lain pendakwaan, sekaligus menyebabkan beliau gagal membocori kes pendakwaan. Beliau langsung tidak menjelaskan apa yang beliau lakukan dengan

berada di atas badan simati dengan pisau ditangan. Di satu peringkat, beliau cuba menjelaskan mengapa beliau mempunyai kesan-kesan di seluruh badannya, iaiau bahawa ia dilakukan oleh Jumain, tetapi penjelasannya itu tidak konsisten dengan keterangan-keterangan lain. Secara terus terang, Jumain tidak mungkin menyebabkan kecederaan-kecederaan tersebut kerana beliau tiada di situ semasa kejadian berlaku. Beliau telah pun keluar bekerja seperti yang disahkan oleh deposisi Samsudin, testimoni tidak mempersalah SP9 serta pengakuan perayu sendiri.

(7) Walaupun SP9 tidak melihat perbuatan perayu menyebabkan kecederaan-kecederaan yang membawa kepada kematian simati, kesan kumulatif keseluruhan keterangan ikut keadaan menunjuk dengan cukup jelas kepada kebersalahan perayu. *Tulshiram v. State of Maharashtra* (diikuti). Di peringkat pembelaan, perayu telah memperjudikan nasibya dengan menghujahkan pembelaan yang amat tidak masuk akal, iaitu dengan mengemukakan pembelaan penyangkalan semata-mata sambil mempersalahkan Jumain. Sedangkan semua keterangan menunjukkan bahawa Jumain tidak berada di rumah tersebut sewaktu kejadian. Pembelaan ini, setelah diuji dengan keseluruhan keterangan-keterangan yang dikemukakan oleh pendakwaan, hanyalah pada tahapnya yang terbaik merupakan satu percubaan desperate oleh perayu untuk melepaskan dirinya dari satu situasi yang mustahil. Semua keterangan-keterangan, bilamana diikat bersama-sama, termasuk 'the most innocuous strand' seperti kembalinya SP9 ke rumah tersebut tidak lama selepas kejadian di mana beliau melihat mayat simati di dapur, tidak dapat tidak menunjukkan kepada kebersalahan perayu. Orang terakhir yang SP9 lihat berada dengan simati adalah perayu. Berdasarkan keseluruhan keterangan, di akhir perbicaraan, pendakwaan telah membuktikan kesnya di luar keraguan munasabah.

Case(s) referred to:
Adikanda Das v. State of Orissa [1988] Cri LJ 1884 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 CA ***(refd)***
DA Duncan v. PP [1980] 2 MLJ 195 ***(foll)***
Tulshiram v. State of Maharashtra [1984] Cr LJ 209 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180, 182A
Evidence Act 1950, ss. 8, 32(1), 114(g)
Penal Code, ss. 300, 302

For the appellant - Mohamed Haniff Khatri Abdullah; M/s Haniff Khatri
For the respondent - Mangajarkarasi Krishnan DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-1-2000]

Reported by Suresh Nathan

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] The appellant was convicted for the murder of one Aminah binti Bahrah ("the deceased") and was sentenced to death in accordance with s. 302 of the Penal Code ("the Code"). The appellant appealed against his conviction to this court. The appeal was dismissed and the conviction affirmed. This was a unanimous decision.

[2] The offence was committed on 27 July 1998 sometime between 5.30am and 6.30am at house No. ST 293, Bukit Perwira, Jalan 11, Selayang Baru, Batu Caves, Selangor ("the said house"). There are five rooms in the said house and three of the rooms were rented out separately by the owner, one Jamaliah bt Mohd Yusuff (SP8). The appellant was a tenant in one of the rooms. The deceased and her family, namely, her husband named Samsudin and a child aged about two years old, were tenants in another room. One Ahmad bin Jumah and also known as Hassan (SP9) was also a tenant in one of the rooms. SP8 kept one of the rooms for her own use and the remaining room was used as a store.

[3] In his evidence SP9 testified that at about 12.30am on 27 July 1998, ie, the day of the incident, the deceased's husband, Samsudin brought a visitor, one Jumain to the said house. Jumain later slept in the lounge of the said house. At about 6.30am on the same day, he heard a scream for help while he was in his room, he then peeped through the door of his room and saw the deceased lying on the floor in the lounge area which was lighted, whilst dressed in a yellow dress. The appellant, who had a green towel wrapped around him but was shirtless, was crouching over her and in his left hand was a kitchen knife whilst his right hand was on her throat. Samsudin and Jumain were nowhere to be seen. Fearing for his life, he did not come out of his room but climbed out through the window in his room and ran away to a nearby hill.

[4] At about 7.15am the same day, he came back to the said house and saw the deceased lying on the floor of the kitchen dressed in her underwear, namely, a brassiere and panty. There were blood-stains on the floor of the kitchen and also the lounge area. He did not see the appellant. He then proceeded to SP8's food-stall which was within the vicinity where he was working as a helper. He did not inform SP8 about the incident as he was too scared. He later went back to the said house at around midnight.

[5] In her evidence, SP8 stated that at about 2pm on the day of the incident, whilst at her food-stall, she was informed by a neighbour that the deceased's child was crying very loudly. She then went to the said house and saw the deceased lying on the kitchen floor and also saw some blood-stains. She consequently proceeded to the Selayang Police Station and lodged a report.

[6] In his evidence, Chief Inspector Mohd Fazley Ab Rahman (SP11), the investigation officer of the case, testified that he was informed about the incident at about 4pm the same day. He then went to the scene of the crime and found the lifeless body of the deceased covered by a green towel. He noticed that there were wounds to the deceased's neck. He later found a knife without its handle in the kitchen of the said house. He also found another knife and some soaked clothing in a pail in the bathroom. The deceased was later sent to the Kuala Lumpur Hospital for a post-mortem to be conducted. SP11 testified that from his investigation, he was of the view that no one else was involved in the crime. He also informed the court that he was not able to serve the subpoena on the deceased's husband, ie, Samsudin as he could not be traced.

[7] Dr Abdul Rahman bin Yusof (SP6) who was attached to the General Hospital Kuala Lumpur and who conducted the post-mortem on the deceased stated in his report that the body of the deceased bore marks of violence which included the following:

(i) a cluster of stab wounds on the right side of the neck just below the pinna and that "these wounds associated with a linear abrasion at the lower part of the wound extending to the nape of the neck 11.0 x 2.0 cms";

(ii) "two stab wounds jointed together at the base upper part of the base of the left side of the neck medial 2.5 x 0.5 cms and lateral 3.5 cms with the depth of the wound 4.0cms directed upwards and inward";

(iii) "a cluster of 9 incised wounds on back of the head extending downwards to the neck; the upper most 10.0 x 1.0 cms (depth 1.0 cms) joint with 2nd wounds 4.0 x 1.0 cms. The 3rd, 4th and 5th wounds jointed together on the average 7.0 x 1.0 cms (1.5 cms depth), the 6th wound 3.5 x 0.5 cms (1.0 cm depth), the 7th and 8th wound were 7.0 x 0.5 cms (1.0 cms depth), the 9th wound (lowermost) across the middle part of the nape of the neck 10.0 x 1.0 cms (1.0 cms depth). These wounds were associated with 7 superficial cuts running parallel across the neck each on the average 7.0 x 0.2 cm";

(iv) "the left jagular [sic] vein was completely severed and these associated with partially severed the left common carotid artery".

[8] SP6 testified that "in combination, all these wounds will give rise to severe bleeding and will give rise to fatal haemorrhage causing the death". He also opined as follows:

> All the stab wounds and slash wounds can cause severe bleeding. Most of the injuries were caused by weapon. Abrasion, bruises and fracture of chin could have been caused by a blunt trauma. I did not find any foreign body in the body. From the nature of the injuries, the weapon consistent with the injuries is a sharp-pointed cutting object eg, kitchen knife. The weapon that cause slash wound is heavier, sharp, cutting object eg, parang.
>
> These are the likely weapons consistent with pattern/nature of injuries.
>
> My conclusion and my examination reveal this healthy lady had sustained multiple injuries including incise and stab wound which given rise to massive bleeding/haemorrhage. In my opinion the cause of death is directly attributed bleeding as a result of those injuries.

[9] Sergeant Major Hassan bin Zakaria (SP4) testified that the appellant was arrested the next day, ie, 28 July 1998 in Felda Linggui, Kota Tinggi, Johor and subsequently brought to Kuala Lumpur.

[10] In his evidence Dr Chong Sai Ho (SP7), a Medical Officer attached to the Kuala Kubu Baru Hospital stated that he examined the appellant on 30 July 1998. He testified that he found the following injuries on the appellant's body; he said:

A Injuries on the knees and thigh could be caused by scratches. The laceration wound on the palm were very superficial, edges clear and straight. In my opinion they were caused by sharp object.

B [Refer P4 L(2)] – laceration on palm – this object (broken glass) can cause the injury.

Injuries are unlikely to be self inflicted.

C Position of patient and person who cause the scratches on the thigh, I would say face to face. It is possible that the person causing the injuries be lying down and the patient (accused) was squatting/bending on top of the (sic) that person.

A kitchen knife can give laceration on the palm by a sharp kitchen knife in self-defence.

D Scratch marks on both limbs – can be caused by nails/scratching by the opposite party.

[11] At the conclusion of the case for the prosecution and after hearing submissions proffered by the learned deputy public E prosecutor and learned counsel for the appellant, the learned trial judge ruled that the prosecution has made out a *prima facie* case against the appellant on the offence charged and consequently called upon the appellant to enter on his defence. The learned trial judge's transcript of the notes of proceedings in relation to F this read as follows:

Pendakwa berjaya membuktikan kes *prima facie* seperti pertuduhan. OKT dipanggil membela diri seperti pertuduhan.

[12] The appellant elected to give evidence on oath. In his G evidence-in-chief, he stated that at about 6am on the morning of the day of the incident, he heard some voices in the deceased's room and saw that the door to her room was ajar. He peeped into the room and saw the deceased dressed in her underwear and a shirtless male person. The said male person suddenly H attacked him with a knife and stabbed him. He managed to grab the knife but the said male person kicked his hand. He took flight but was stabbed in his buttocks and when he turned around was stabbed in his thigh. He then ran to his room. The said male person told him to stay in his room and threatened that he will I kill him if he leaves the room. After the said male person was no longer around, he went to his nephew's house in Johor. He was later arrested by the police.

[13] Under cross-examination, the appellant denied having quarreled with the deceased in the lounge of the said house on the morning of the day of the incident. He stated that when he went to the bathroom to take a bath, he was wearing a green towel and did not see anyone in the lounge. He also stated that the deceased's husband, Samsudin and the said Jumain had by then left for work. He denied that he stabbed the deceased.

[14] In re-examination, the appellant testified that when he got up in the morning on the day of the incident, the said Jumain had left for work as he was not in the lounge area of the said house. He later said he presumed that the said Jumain had left for work. However, he also said that he heard the said Jumain's voice coming from the direction of the deceased's room. In relation to the laceration wound on his hand, he claimed that that wound was inflicted by a knife used by the said Jumain. He also said he went to SP9's room but the latter was not in. This was how he put it:

> Bila saya bangun pagi Jumain telah pergi kerja sebab dia tak ada di ruang tamu. Dalam bilik Aminah, saya dengar suara Jumain.
>
> Saya anggap dia sudah pergi kerja.
>
> Luka ditangan – saya dapat kerana pisau yang diguna oleh Jumain menikam saya. Saya tangkap pisau itu, dia tarik. Saya pergi ke bilik Hassan. Hassan tak ada. Bilik itu kosong.

[15] At the conclusion of the trial, after considering all the evidence before him, the learned trial judge found that the prosecution has proved its case beyond reasonable doubt and consequently found the appellant guilty of the offence of murder as charged and convicted him. In relation to the defence case, he said:

> Keterangan tertuduh sebagai pembelaan adalah jelas satu pembohongan. Ia tidak perlu dianalasis dengan panjang lebar. Ia bukan sahaja tidak menimbulkan apa-apa keraguan terhadap kes pendakwaan, malah menguatkannya.

[16] The appellant appealed.

[17] Before this court, counsel for the appellant argued that the learned trial judge failed to undertake a maximum evaluation of the evidence adduced at the close of the case for the prosecution and had applied the wrong standard of proof.

[18] In relation to the evidence of SP9, counsel pointed out that the learned trial judge was of the view that SP9's reaction upon witnessing the crime was unusual, namely, he left the said house through the window of his room and ran away to hide and when he returned, after seeing the body of the deceased in the kitchen, he went to work at SP8's stall but did not inform SP8 or anyone else about the incident. In relation to the incident, counsel argued there was no evidence that the place where the incident took place was lighted and hence the learned trial judge erred in accepting SP9's evidence that he saw what transpired at the material time. In the same vein, counsel argued that the learned trial judge was wrong in accepting the evidence of SP9 when SP9 had access to the place of the incident and hence the opportunity to commit the offence himself.

[19] Counsel also argued that, in relation to the non-calling of Samsudin, ie, the deceased's husband and the said Jumain by the prosecution, the learned trial judge erred in not applying the presumption under illustration (g) of s. 114 of the Evidence Act 1950, *viz*., that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it, against the prosecution.

[20] Finally, counsel argued that the learned trial judge never considered the appellant's defence and just came to the conclusion that his defence was based on lies and does not raise any reasonable doubt on the prosecution's case.

[21] I cannot find any basis for counsel to argue that the learned trial judge failed to undertake a maximum evaluation of the evidence at the close of the case for the prosecution and had applied the wrong standard of proof.

[22] The appellant was charged with murder and hence the prosecution must prove the following ingredients:

(i) that the death of Aminah binti Barah, *viz*., the deceased had taken place;

(ii) that her death had been caused by or in consequence of the act of the appellant; and

(iii) such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused her death.

[23] It is not in dispute that the first ingredient has been proved. With regards to the second and third ingredients the prosecution has adduced the following evidence:

(i) the deceased, the appellant and SP9 were residing in the said house, albeit in different rooms;

(ii) on the morning of the incident, SP9 heard a scream and upon peeping through the door to his room saw the following:

(a) the deceased was lying on the floor in the lounge area of the said house which was lighted, whilst dressed in a yellow dress; and

(b) the appellant, who had a green towel wrapped around him but was shirtless, was crouching over her and in his left hand was a kitchen knife whilst his right hand was on her throat;

(iii) Samsudin, the deceased's husband and his friend, Jumain were nowhere to be seen at that material time;

(iv) fearing for his life, SP9 did not come out of his room but climbed out through the window to his room and ran away to a nearby hill;

(v) when SP9 came back to the said house he saw the deceased lying on the kitchen floor dressed only in her brassiere and panty and saw blood-stains on the kitchen floor;

(vi) SP9 then proceeded to SP8's stall where he worked as a helper and did not inform anybody about the incident;

(vii) later, SP8, upon being informed by a neighbour that the deceased's child was crying very loudly went to the said house and found the deceased lying on the kitchen-floor and saw blood-stains on the floor;

(viii) upon being informed of the incident, the investigation officer of the case, SP11 went to the said house and found the lifeless body of the deceased covered by a green towel; he noticed that there were wounds to the deceased's neck and in the course of investigation found two knives;

(ix) SP6, the doctor who conducted the post-mortem found several stab wounds on the deceased's neck and also found that her jugular vein was completely severed; he testified that his examination revealed that the deceased sustained multiple injuries including incise and stab wounds which has given rise to massive bleeding/haemorrhage and opined that the cause of death was "directly attributed to bleeding as a result of those injuries"; he was of the view that most of the injuries were caused by a weapon and the weapon consistent with the injuries was a sharp-pointed cutting object, eg, a kitchen knife;

(x) the appellant was arrested in Johor on the following day;

(xi) SP7, the doctor who examined the appellant after his arrest testified that he found certain injuries on the appellant's body which he opined were caused by a sharp object and that these injuries were unlikely to be self-inflicted; he also found scratch-marks on both his limbs and opined that they could have been caused by finger-nails.

[24] In his grounds of judgment, the learned trial judge after laying down the evidence of the various witnesses in detail and highlighting his perception of the facts before him, found that a *prima facie* case has been made out against the appellant on the offence charged, *viz*., murder under s. 302 of the Code and hence called upon the appellant to enter on his defence; he said (at p. 91 of the appeal record) as follows:

> Apa yang penting ialah menimbang daripada keterangan yang ada sama ada di peringkat pendakwaan menutup kesnya terdapat satu kes *prima facie* untuk tertuduh menjawab pertuduhan terhadapnya.
>
> Saya berpuashati bahawa pendakwaan, diakhir kesnya, berjaya membukti pada tahap *prima facie* bahawa tertuduh melakukan kecederaan-kecederaan ke atas si mati yang menyebabkan kematiannya dan bahawa ia dilakukan dengan niat membunuh, atau dalam kata-kata lain membuktikan pada tahap *prima facie* semua ingredient kesalahan seperti pertuduhan dan dikehendaki oleh seksyen 300 Kanun Keseksaan.
>
> Maka saya memanggil tertuduh membela diri seperti pertuduhan.

[25] The appellant elected to give evidence on oath. At the conclusion of the trial, as discussed earlier, the learned trial judge found that the prosecution has proved its case beyond reasonable doubt and found the appellant guilty of the offence of murder as charged and convicted him.

[26] After a careful perusal of the appeal record and the learned trial judge's grounds of judgment I cannot see any merits in this appeal. The learned trial judge has religiously followed what was required of him pursuant to ss. 180 and 182A of the Criminal Procedure Code. With regards to these provisions, I would refer to *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85. In delivering the judgment of this court, Augustine Paul JCA (as he then was) said (at pp. 99-100):

> As the offence in this case was committed in 1998 the burden of proof on the prosecution is governed by ss. 180 and 182A of the Criminal Procedure Code as amended in 1997 ("s.180" and "s.182A" respectively). They read as follows:
>
> Section 180
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> Section 182A
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.
>
> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of

proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase "*prima facie* case" in s. 180. Section 180(2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out while s. 180(3) provides that if a *prima facie* case has been made out the accused shall be called upon to enter his defence. A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, 11th edn as:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s. 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close

of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s. 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[27] In relation to the non-calling of the deceased's husband, Samsudin and Jumain as witnesses for the prosecution, the learned trial judge said as follows:

Ketidak hadiran Samsudin, suami si mati tidaklah mencacat kes pendakwaan atau boleh membangkitkan andaian sebaliknya di bawah seksyen 114(g) Akta Keterangan 1950. Keterangan dikemukakan bahawa dia telah 'dilarikan' oleh empat orang lelaki beberapa minggu selepas isterinya dibunuh. Dalam "kehidupan liar" warga Indonesia, baik di negara mereka atau di sini tidaklah menghairankan jika dia juga telah 'lenyap'.

Saya juga berpendapat bahawa kegagalan memanggil Jumain juga tidak mencacatkan kes pendakwaan. SP11 memberi keterangan bahawa dia tidak siasat Jumain kerana mengikut Samsudin (suami si mati) Jumain telah balik ke Tanjong Malim. Saya akui bahawa beliau sepatutnya berbuat lebih dari itu dan mengatakan sesuatu

A yang lebih dari itu. Tetapi, soalnya adakah kegagalan mencari Jumain itu (kita mesti ingat dia juga seorang pendatang, 'tanpa izin' atau tidak kita tidak tahu) menyebabkan timbulnya keraguan ke atas kes pendakwaan. Ini mesti dilihat dari keseluruhan keterangan yang ada. Mengikut pertimbangan saya tidak.

B With regards to this issue, SP11 testified that he had in the course of investigation recorded a statement from Samsudin but subsequently was unable to serve a subpoena on him as he could not be traced. One Inspector Mohd Razali Taib (SP12) also testified that he was unable to trace Samsudin. In relation to C Jumain, SP11 said he was informed earlier by Samsudin that Jumain had gone back to Tanjong Malim. He also said he did not carry out an investigation on Jumain.

[28] Under the above circumstances, I cannot see the relevance D of counsel canvassing that s. 114 illustration (g) of the Evidence Act 1950 would apply. Section 114(g) illustration (g) provides "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". The simple reason why the prosecution did not call Samsudin to testify E or even offer him as a witness for the defence was that he could not be traced. The police could not serve a subpoena on him to compel his attendance in court.

[29] Further, I cannot think of any reason why the prosecution would want to withhold him from coming to court to testify. At F the time of the incident SP9 had seen only the appellant with the deceased. The appellant himself said when he got up in the morning, Samsudin had gone to work as he was not in the lounge. In relation to Jumain, SP11 testified that he did not carry out an investigation on the former. This would denote that SP11 has G never met Jumain in the course of his investigation and hence never recorded a statement from him. Unless counsel can show there was a deliberate suppression of evidence, I cannot see how s. 114 illustration (g) of the Evidence Act 1950 can be raised here.

H

[30] In relation to the evidence of SP9, counsel for the appellant had pointed out that the learned trial judge was of the view that SP9's reaction upon witnessing the crime was "unusual", namely, he left the said house through the window of his room and ran I away to hide and when he returned, after seeing the body of the deceased in the kitchen, he went to work at SP8's stall but did not inform SP8 or anyone else about the incident. In relation to the incident, counsel argued there was no evidence that the place

where the incident took place was lighted and hence the learned trial judge erred in accepting SP9's evidence that he saw what transpired at the material time. In the same vein, learned counsel argued that the learned trial judge was wrong in accepting the evidence of SP9 when SP9 had access to the place of the incident and hence the opportunity to commit the offence himself.

[31] I find it difficult to comprehend the last part of the submission above. In the court below, the appellant never suggested, as a defence, during the case for the prosecution that SP9 had the opportunity to commit the offence himself neither was such a defence raised specifically or otherwise during the defence case. What is clear from the notes of evidence and minutes of the proceedings is that there was the lack of cross-examination of witnesses by the defence suggesting that SP9 could have been the person who murdered the deceased as he had the opportunity to do so. Further, that SP9 could have been the person who committed the offence was suggested for the first time only at this appeal and not at the trial. In the court below the appellant testified that he heard Jumain's voice coming from the direction of the deceased's room that morning and that the wound on his hand was inflicted by a knife used by Jumain which, to me, would seem to be that the appellant was suggesting that it was Jumain who had the opportunity to inflict the injuries on the deceased.

[32] Counsel also submitted before this court that the learned trial judge never considered the appellant's defence. He argued that the learned trial judge just came to the conclusion that the defence was based on lies and does not raise any reasonable doubt on the prosecution's case. With due respect to counsel, I cannot see any merit or any basis for this argument. In his grounds of judgment, the learned trial judge dealt at length with the evidence of SP9. He expressed his view that SP9's reaction by running away, after he saw what transpired in the lounge area of the said house on the day of the incident, was a bit unusual but reasonable. He was also of the view that SP9 was not a very intelligent person. Under the circumstances that SP9 was faced with, the learned trial judge opined that his reaction by running away was understandable. He said (p. 87 of the appeal record):

> Melihat wataknya, alasannya bahawa dia adalah bertindak sedemikian rupa adalah munasaba, bagi orang sepertinya. Juga adalah munasabah jika kita ambil kira keadaan tertuduh semasa dilihatnya sedang memegang pisau itu. Memandangkan banyak dan

A teruknya luka-luka di badan si mati, seorang perempuan yang semesti tidak mampu melawan, adalah munasabah mengandaikan bahawa tertuduh pada masa itu seperti seorang "amok" yang sudah hilang pertimbangan sama sekali. Dalam keadaan itu, berkemungkinan besar sesiapa sahaja yang cuba menghalangnya akan diterkamnya. Dalam keadaan itu dan melihat watak SP9, tindakannya bolehlah difahami.

[33] The question that the learned trial judge had to answer at the conclusion of the trial was whether on the totality of the evidence, adding them together and considering them altogether, C lead to the irresistible conclusion that it was the appellant who committed the crime. The evidence clearly showed that it was the appellant who committed the crime and that the learned trial judge was correct in arriving at the decision that he did when he called on the appellant to enter on his defence. On the face of the D record at the close of the case for the prosecution, it is clear that a case under s. 302 of the Code has been made out against the appellant. The evidence links the appellant with the act of killing and establishes the offence charged.

E **[34]** At the conclusion of the trial, the evidence in its totality confirmed in material particulars that it was the appellant who murdered the deceased. No miscarriage of justice has occurred in this case and hence the appeal was dismissed. The conviction and sentence were affirmed.

F **Suriyadi Halim Omar JCA:**

[35] The appellant, one Mohd Bakri bin Belaho, was charged for murder under s. 302 of the Penal Code. The charge reads:

G Bahawa kamu pada 27 Julai 1998 jam lebih kurang 5.30 hingga 6.30 pagi di rumah bernombor ST 293, Bukit Perwira, Jalan 11, Selayang Baru, Batu Caves, di dalam Daerah Gombak dalam Negeri Selangor Darul Ehsan, telah melakukan pembunuhan ke atas Aminah binti Bahrah, dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 H Kanun Keseksaan (Akta 574).

[36] In English, and to put things in perspective, the date of the offence was 27 July 1998 with the time being in and about 5.30am to 6.30am. The place was at ST 293, Bukit Perwira, Jalan 11, Selayang Baru, Batu Caves and the victim being Aminah binti I Bahrah (hereinafter referred to as the deceased). The prosecution had called 13 witnesses to establish its case, and at the end of the trial, the learned tial judge had found the appellant guilty as per the charge and sentenced him to death by hanging.

[37] The appellant had subsequently filed an appeal. The appeal was founded on the following grounds, *inter alia* that the judge had:

i. erred in accepting SP9's evidence as direct evidence categorized as beyond reasonable doubt;

ii. had accepted SP9's evidence even though he had behaved in an unusual way after witnessing the incident;

iii. accepted the evidence of SP9 identifying the appellant even though there was no evidence of the relevant area being sufficiently lighted;

iv. erred as SP9 had equal opportunity to kill the deceased;

v. erred in being swayed by the appellant going to Kota Tinggi with a hand injury;

vi. erred in not invoking s. 114(g) the Evidence Act 1950 against the prosecution for not calling the husband and another witness whence they were around the vicinity;

vii. erred when admitting the husband's statements under s. 32(1) Evidence Act 1950 (I), which were prejudicial to the appellant;

viii. erred in not giving the benefit of the doubt to the appellant, by the admitted failure of the prosecution to dust for fingerprints, and failing to investigate the ownership of a crash helmet seen in the photographs; and

ix. had invoked the wrong burden of proof.

[38] The appeal was heard by this panel and at the end of the hearing was dismissed. I now supply the reasons for its dismissal.

[39] As said above, the prosecution had called 13 witnesses to establish its case and they are as follows. The first witness SP1, a police personnel works at the inquiry section at the Selayang police station. On 27 July 1998 at about 2.50pm, a lady by the name of Jamaliah bt. Mohd (SP8) had reported to him that she had seen traces of blood splattered around house number ST 293 Lembah Mutiara, Bukit Perwira at Selayang. He had later transmitted the information to Chief Inspector Yeow Wan Long (SP10).

[40] The second witness SP2 was a photographer attached to the Selayang police station. On 27 July 1998 at about 5pm he went to ST 293 Kampung Lembah Mutiara at Selayang together

with Inspector Fazley b. Abdul Rahman (SP11) and there on instruction had taken 41 photographs (P3(1)-(41)) of the scene of a murder. In the morning of 28 July 1998 at the office of Inspector Fazley he took a further 7 photographs of exhs. (P3 (42) A-(48) connected to the said murder. He also later took 32 photographs (P3 (49)-(80) of the post mortem. These photographs and the negatives were tendered into court by him in the course of the hearing.

[41] The 3rd witness ie, SP3 is a storekeeper of the exhibits' room at the Gombak IPD. On 23 April 1999 he had received and had stored the exhibits connected to this case. When he received them, *viz*. 13 envelopes, 5 bottles, a tube and 4 plastic packages, they were all sealed with the Jabatan Kimia seal and were intact.

[42] The 4th witness ie, SP4, on 28 July 1998 was in charge of the police station at Batu 4, Kota Tinggi, Johore. On that day at about 9am he had received a telephone call from a member of the public, reporting of an Indonesian behaving suspiciously at Felda Linggiu, Kota Tinggi. He had thereafter proceeded to that location. On arrival he was informed that a member of the RELA had arrested an Indonesian citizen, called Mohd. Bakri bin Baleho, his name derived from his identification card. In court he had identified the appellant as that Indonesian.

[43] On physical examination of the appellant he had found a plaster which covered a cut on his hand. He had later rearrested the appellant. After making some enquiries, which led all the way to the Selayang police station, he finally was connected to Inspector Fazley (SP11). He later handed the appellant over to one Sergeant Major Zaleha from Selayang IPD.

[44] The 5th prosecution witness was a chemist attached to the Department of Chemistry at Petaling Jaya. He had worked for the Government for the past 23 years. On 6 August 1998 after having received 23 items, all sealed and labeled with the name of Mohd Bakri, he had examined them. Amongst the items were a plastic bag (marked "I") containing a chopper bearing 6 strands of hair, a plastic bag containing a knife without a handle (marked "J"), a plastic bag (marked "K") containing a black handle which fitted the knife in "J", a plastic bag (marked "L") containing a piece of broken glass bearing 8 strands of hair, and a bottle (marked "N") containing a specimen of head hair. On analysis of the exhibits, he found in some of the exhibits eg, cotton wool pieces (marked "A-

C"), clothes (marked "D-G"), a towel (marked "H"), the knife (marked "J"), and glass piece (marked "L") blood stains of the B group type. Regretfully, even though the chopper (marked "I") bore human blood stains, he failed to group them. He opined that the hair strands on chopper "I" and glass pieces marked "L" could have originated from the hair in "N" labeled Aminah bt. Bahrah. The blood specimen which carried the name of Aminah bt Bahrah (marked "O") was analysed to be of the B group.

[45] The 6th witness ie, SP6, a consultant at the Forensic Medicine Hospital, Kuala Lumpur who had worked at the Kuala Lumpur Hospital since 1979, had examined the body of Aminah bt Bahrah. In his testimony he had concluded that many of the injuries were consistent with injuries inflicted during life. He found presence of hemorrhage and bruises also consistent with injuries during life; as regards the internal examination there was no abnormality of disease detected. At the early stages of the hearing he had testified that fatal hemorrhage was due to:

(1) the wounds on the neck in particular No 11 had severed/cut left jugular vein and partially cut left carotil artery;

(2) presence of bleeding on the surface of the brain; and

(3) multiple open wounds.

In combination, all these wounds will give rise to severe bleeding and will give rise to fatal hemorrhage causing the death.

[46] As regards the wounds, he had testified that all the stab wounds and slash wounds could cause severe bleeding, with most of the injuries caused by some weapon. From the nature of the injuries, the weapon consistent with the injuries was a sharp-pointed cutting object eg, a kitchen knife. In this case the broken knife could have caused the stab wounds. He believed that the weapon which had caused the slash wound was sharp, heavier, and for cutting objects eg, a parang whereupon he had opined that the chopper could have caused the incised wounds.

[47] He had concluded that the deceased had sustained multiple injuries, giving rise to massive bleeding, with the cause of death directly attributable to it. The lapse of time between the injuries and death would be fast, as it would take only a few minutes, especially after the main vessel to the head at the neck had been cut.

[48] The 7th witness is another doctor who had examined the appellant and had found injuries on the knees, thighs and laceration wound on the palm. He had testified that a sharp kitchen knife could have caused the laceration on the palm. This witness had also expressed the view that the scratches on the thighs of the appellant took place when he was face to face with the person who had scratched him. It was possible that that person was lying down and the appellant was squatting or bending on top of the former.

[49] The 8th witness was the house owner of No. ST 293, Bukit Perwira, Jalan 11. Selayang Baru. She had testified that the house had 5 rooms, one each rented out to the deceased and her family, the appellant, and a person called Ahmad Jumah (SP9), with the other 2 being left unoccupied. This witness had testified that on 27 July 1998 at about 2pm she was informed that the deceased's child was crying incessantly. On being told of that, she had returned to the above house, where she met the child. After making certain enquiries from her, through the kitchen door she saw the deceased lying on the floor, prompting her to report to the police of what she had seen.

[50] She also testified that Ahmad Jumah (SP9) whom she referred to as Hassan, worked as her shop assistant, and had come to work on that day either at 7pm or 8pm. He had told her nothing when at work.

[51] SP9, the 9th witness for the prosecution testified that in July 1998 he had rented one of the rooms at ST 293, Bukit Perwira, Jalan 11, at Selayang Baru. His immediate neighbours were the deceased who stayed with her family in one of the rooms, and the appellant in another.

[52] He had testified that on the morning of 27 July 1998 he had heard a scream crying out for help from the lounge. Without opening the door, he had peeped through it, and saw the appellant holding a kitchen knife on his left hand. The knife was quite similar to P4J (2). The deceased who was in a yellow dress was lying on the ground. The appellant was seen by him in the posture of crawling ('merangkak') on top of the deceased, with his right hand holding the neck of the deceased. He was then shirtless and only wrapped in a green towel. No one else was at the lounge. He could see well as the light from the lamp was bright.

[53] As he was in fear he had exited through the window and had immediately run all the way up to the top of the hill. He descended and re-entered the house through the front door at about 7.15am. This time he found the deceased at the kitchen but only in her underwear and brassiere. She was not moving. Apart from the deceased there was no one else in the house. He thereafter grabbed his shirt and went straight to SP8's shop. At the shop he said nothing to SP8.

[54] During the cross-examination he had cleared the deceased's husband, one Shamsuddin and his cousin Jumain who came for a visit the night before, of their involvement in the murder, when he testified that they were not in the house at the time of the incident. When suggested to him by the appellant's counsel he had denied that he had attempted to 'disturb' the deceased with Jumain.

[55] The 10th witness for the prosecution, SP10, was the officer in charge of the police station of Selayang. At about 3.50pm on 27 July 1998 he was informed by SP1 of a complaint by a Malay lady of having seen large traces of blood in a house at Kampong Lembah Mutiara, Selayang. He then went to the house numbered as T 293. Blood was all over the place and when he followed the trail of blood to the kitchen, he found a dead woman there, suspected of being a victim of murder. Refraining from touching anything he then telephoned the Criminal Division to take over the investigation.

[56] SP11 was the 11th witness for the prosecution, and on 27 July 1998 was the duty criminal investigating officer at the Selayang police station. On that date he had received a call pertaining to a murder at ST 293, Kampung Lembah Mutiara, Bukit Perwira, at Selayang, whereupon he had proceeded to the scene of the murder. There he carried out an investigation as ordered by his superior, one Assistant Superintendent Chen. He admitted ordering SP2 to snap photographs at the necessary places and the relevant exhibits as per the tendered pictures. He saw blood splattered about and things strewn around, in the like of broken glasses, handle of a knife etc. at the lounge. In the kitchen he saw the body of the deceased, covered with a green towel, wearing underwear and brassiere only. He collected and packed all the relevant exhibits in the like of a stainless knife, clothes etc., in plastic packages, and thereafter took them to the office. He then instructed the corpse to be taken to the Kuala

Lumpur General Hospital for a post mortem, of which was carried out the next day. He received information of the arrest of the appellant whilst in the midst of the postmortem and had accordingly made arrangements to transport the appellant to Kuala Lumpur. He had also ordered samples of hair, blood, toe nails of the deceased and other items gathered during the investigation to be sent to the Chemist Department, to be retrieved later by one L/kpl Liyana. He met the appellant on 29 July 1998 and immediately took him to the Kuala Kubu Baru hospital for a physical medical examination.

[57] During his testimony, he clarified that he was unable to serve the witness subpoena on Shamsudin bin Salahudin (husband of the deceased) as he was informed by one Inspector Razali that he had been kidnapped, as per Rawang Report 4262/98. SP11 had also testified that he had recorded a witness statement (s. 112 of the Criminal Procedure Code) from him. Noticeably, as reflected from the notes of proceedings, the appellant had not objected to it being tendered. Much of Shamsudin's statement *inter alia*, revolved around the overnight stay of his guest, one Jumain, and his personal movements the next morning. SP11 had tendered and read out Shamsudin's statement and the pertinent portion reads:

> Pada 26.7.98, jam lebih kurang 9.30 malam, saya balik dari Tanjong Malim bersama Jumain untuk bermalam di rumah saya. Jumain adalah saudara saya yang bekerja di Tanjung Malim sebagai buruh binaan … saya pun kunci bilik tidur dan kami semua pun tidur … Pada jam 5.00 pagi, saya bangun dari tidur dan saya kejutkan Jumain dan saya nampak bilik Deng Mohamad dan Hassan tutup. Saya terus mandi serta menyiapkan diri untuk pergi kerja dengan Jumain. Pada jam 5.30 pagi saya kejutkan isteri saya dan bagitahu saya hendak pergi kerja. Isteri saya menjawab "ya". Saya pun keluar bersama Jumain pada jam 5.30 pagi untuk pergi kerja di Sri Petaling. Semasa keluar saya tutupkan pintu bilik tidur saya samada ada kunci atau tidak oleh isteri saya saya tidak tahu. Masa itu Hassan dan Deng Mohamad berada di dalam bilik masing. Saya dan Jumain pergi kerja naik bas …

[58] In a gist this portion of the statement established that Shamsudin (husband of the deceased) and Jumain had already left the house when the murder took place.

[59] SP12, the last prosecution's witness had testified that Shamsudin, the deceased's husband, had been kidnapped and an investigation paper (IP) accordingly had been opened up. From his investigation he found that Shamsuddin had been kidnapped by 4 bogus policemen who had come dressed in civilian clothes. Todate not only has Shamsuddin remained untraced but no successful arrest of any of the kidnappers has taken place.

[60] At this stage, it would be quite useful if s. 302 of the Penal Code were reproduced and in the course of it, where necessary, to offer some explanation. This section reads:

> Whoever commits murder shall be punished with death.

[61] Under s. 300 it is promulgated that:

> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[62] So, was the act complained of murder and was the appellant the murderer? In the current case it was not disputed that bodily injuries were present, some of them being wounds to the neck, bleeding on the surface of the brain and multiple wounds in the like of stab and slash wounds.

[63] I now touch on some of the specific injuries found and intended to be inflicted and their effects. SP6, the doctor who performed the post mortem at the earlier stages of his examination had stated that 'all the stab wounds and slash can cause severe bleeding (RR26).' Pertaining to the neck injury he was equally specific when he had stated that, "Lapse of time between injuries

and death. This is considered fast, it takes only a few minutes especially after the main vessel to the head (at the neck) is cut (RR 28)." At the tail-end of the examination-in-chief this witness, who was a consultant at the Forensic Medicine Hospital, in Kuala Lumpur had testified:

> My conclusion and my examination reveal that this healthy lady had sustained multiple injuries including incise and stab wound which gave rise to massive bleeding/hemorrhage.

[64] He then had concluded that "Fatal hemorrhage was due to:

> 1. the wounds on the neck in particular no. 11 had severed/cut left jugular vein and partially cut left carotil artery;
> 2. presence of bleeding on the surface of the brain; and
> 3. multiple open wounds.
>
> In combination, all these wounds will give rise to severe bleeding and will give rise to fatal hemorrhage causing the death (AR 25).

[65] I was thus satisfied that the injuries were sufficient here in the ordinary course of nature to cause death. It is my view that by the very nature of the wounds, the motive of the appellant was not limited to the mere sadistic pleasure of frightening the deceased, but to severe her neck. Here the jugular vein had been sliced and parts of the carotil artery had also been severed. There was no denial that death would have been guaranteed merely from the wounds of the severed jugular vein, let alone from the combination of all the wounds, which had given rise to severe bleeding, followed by fatal hemorrhage.

[66] As a point of clarification, to qualify to fall within the heading of murder, the said sufficiency must lead to the high probability of death in the ordinary course of nature. Therefore when this sufficiency exists and death follows as in this case, and the causing of such injuries was intended then the offence of murder would have been committed. All the above pertinent findings, had also in crystal clear terms, been laid down in the talking grounds of judgment, adequately reflecting that His Lordship had meticulously considered the evidence before him (AR 82-85). The above medical evidence was prognosed and considered together with the contributive evidence as imparted by SP7.

[67] The above is as regards the injuries. I now touch on the issue of the weapons involved. What then was used when causing the injuries? SP9 had testified that he had seen the appellant holding a knife, when on top of the deceased person, while at the

same time holding the neck with the other hand. The police when conducting the investigation had, amongst others seized a loose handle of a knife at the lounge, pieces of broken glass, 2 knives one without a handle at the kitchen, and a chopper retrieved from a water container.

[68] SP5, a chemist by occupation failed to detect any blood stains on the loose knife handle or for that matter on the glass. He testified that he had found the deceased's hair on the chopper. The forensic expert ie, SP6 had affirmed that the chopper could give rise to incise wound though not a stab wound but had agreed that the knife without the handle could cause the stab wound. What could not be denied was that the chopper, which had strands of the deceased's hair, was one of the weapons used to subdue the deceased person and which eventually led to her demise. What could not be disputed too was that there were stab wounds found on the body of the deceased.

[69] A cursory inspection of the pictures of the formidable chopper, or knife without the handle, would give the shivers to anyone. The irresistible inference would be that whichever weapon was used, with the chopper being the probable one as it had the deceased's hair and suitable to "sembelih" her (to allude to the judge's words), the irresistible inference must be that there was an intention to kill the deceased.

[70] Combining the effect of the weapons used in the incident, together with the nature of the wounds inflicted, the part of the body on which the injuries were inflicted, with the probability of death resulting being high, everything pointed to an intention to cause death or injury sufficient in the ordinary course of nature to cause death. From the severity of the wounds as caused by that chopper and the other knife for stabbing purposes, the appellant could not now come forward and say that he was unaware that those wounds would in all likelihood have caused death, let alone that they were accidental or unintended.

[71] We now broach the subject of the identity of the murderer and visualize what actually happened at the relevant time. For this I have to sift through the entire evidence adduced by the prosecution especially the testimonies of SP8 and SP9, and the statement of Shamsuddin pursuant to s. 112 of the Criminal Procedure Code tendered in open court pursuant to s. 32 of the Evidence Act. Before discussing their testimonies, it is necessary that I touch first the veracity of these relevant witnesses, assisted

A tremendously by the contributions of the learned High Court judge who had had the advantage of listening and observing them. That high vantage was certainly not enjoyed by us.

[72] Needless to say the success of the prosecution depended
B much on SP9 as he was the only eye witness who could connect the appellant to the murder. Without him a huge gap would exist in the prosecution's case. Further, no substantive part of his evidence could be accepted by the court unless he had passed the test of his acceptability first as a witness, in the light of his
C timidity. Here he had not bravely confronted the appellant, who was holding a knife, and who had not hesitated to use it as evidenced by the blood splattered in the lounge and the kitchen. His behaviour and conduct as I saw it, was a man who had surrendered to his inner survival instinct, more so as this timid
D Indonesian had come to Malaysia to eke out a living. Getting entangled with trouble especially with an enraged man must have been the last thing he wanted. Timidity thus should not be taken against him let alone there is no legal precept in existence which presumes that a timid person has a propensity to lie or embellish
E his testimony. Here SP9 in crystal clear terms had said that he saw no one stabbing the deceased but holding the knife he did ("Saya tak nampak orang tikam Aminah, tetapi pegang pisau saya nampak.") He thus had remained within the boundaries of what he saw and heard only and nothing more.

F **[73]** The High Court judge who had witnessed the demeanour of SP9 had correctly remarked:

> Tetapi saya bukan sahaja telah mendengar keterangannya. Saya telah memerhatikan watak dan kelakuannya. SP9 jelas seorang
G yang kecerdikannya di bawah tahap biasa, jenis yang tiada inisiatif dan keyakinan diri. Di Mahkamah pun dia nampak keberatan menyebut nama tertuduh. Jika tidak masakan dia boleh hanya bekerja menolong SP8 menjual makanan digerainya.
>
> Melihat wataknya alasannya sedemikian rupa kerana takut adalah
H munasabah, bagi orang sepertinya …

[74] Having scrutinized the evidence I see no reason to disagree with the overall findings and views of the presiding judge regarding this witness. The court had considered the mental capacity of SP9
I and had concluded that the latter was a person of below average in intelligence. I see no reason why the testimony of a person of limited intelligence could not be accepted (apart from the factor of timidity). What was important was that his veracity and

credibility had withstood the test of the appellant's cross-examination and had weathered it. That being so what SP9 had heard and saw, especially that part of seeing the appellant holding a knife on the left hand, with the other holding the deceased's neck, had pinned down the appellant to the charge.

[75] Admittedly the issue of the non-presence of illegal immigrant witnesses, when required to come forward to testify, could not be divorced from the harsh realities of their wayward world, whence to volunteer evidence would be perceived as a guarantee to a one way passage back to Indonesia at the conclusion of the trial. I saw no justifiability in invoking any adverse inference merely on the failure of the prosecution to secure their attendance in court due to this want of co-operation in the circumstances of the case. The incidence of Shamsudin's kidnapping, and the non-presence of Jumain, an illegal immigrant merely concretized this. All these issues were maturely and realistically discussed by the presiding judge and the views were beyond reproach. From his vantage position the High Court not only had correctly assessed the creditworthiness of the prosecution's witnesses that had come forward to testify but had also supplied a reasoned view for the absence of Shamsudin and Jumain.

Other Corroborative Evidence

Injuries On The Appellant

[76] SP7 a doctor at the Kuala Kubu Bharu Hospital had conducted a physical medical examination on the appellant about three days after the incident. He found the presence of injuries on his knees, buttocks and palm, and in the course of the hearing had supplied a reasonable view as to how they could have come about. He viewed that the injury to the palm could possibly having been caused by the uncovered knife when holding it; the superficial scratches on the appellant's thighs were caused by the deceased's struggle when they were 'face to face', and the injuries to the knees when they were scraping the ground when on top of her. All these had been covered by the judge and I saw no reason to disagree with the conclusions.

Free Hand Of The Appellant

[77] At the time when the murder was being committed, there was no one else in the house as confirmed by SP9, corroborated further by the deposition of Shamsuddin (husband of the

deceased). This deposition was tendered pursuant to s. 32 of the Evidence Act, and was a statement of a relevant person who could not be found. This statement recorded under s. 112 of the Criminal Procedure Code, was made in the course of, or for the purposes of an investigation into an offence (of murder in this case) under a written law (Penal Code).

[78] From the testimonies of the police witnesses it had been clarified that Shamsuddin could not be found as he had been kidnapped by unknown persons. Perhaps conceding to the truth of that clarification, and that all the preconditions had been satisfied it was no surprise that no objection was registered by the appellant as reflected by the notes of the proceedings. A scrutiny of the evidence adduced satisfied me that there was sufficient justification for the admission of Shamsuddin's deposition under s. 32 of the Evidence Act. In support of the correctness of the admission of the latter's deposition, suffice if I allude to *DA Duncan v. Public Prosecutor* [1980] 2 MLJ 195 where Raja Azlan Shah CJ (Malaya) (as His Royal Highness was then), delivering the judgment of the Federal Court, when permitting the allusion to a preliminary enquiry deposition, had said:

> Part of the evidence consisted of a deposition at the Preliminary Enquiry of a witness who could now not be traced. The deposition was admitted over the protest of counsel for the appellant. We are however fully satisfied that **sufficient evidence** was adduced to **justify the court's admission** of the deposition under section 32 of the Evidence Act (emphasis added).

[79] The contents confirmed that on the same morning, before the murder, he and Jumain had left the house for work. With everyone out of the way, apart from the unexpected hidden presence of SP9 and the deceased's two year old child, what with a legal right to be there by virtue of being a tenant, he thus had the opportunity to commit the offence.

Subsequent Conduct Of The Appellant

[80] The action and conduct of the appellant, absconding to the south, hundreds of miles away from the scene of the crime, unfortunately to be arrested at Kota Tinggi, Johore Bahru merely strengthened the prosecution's case. The Evidence Act provides that the conduct of any party to any fact in issue is relevant. In fact the conduct of any person, an offence against whom is the subject of any proceeding, is relevant if the conduct influences any fact in issue or relevant fact, whether previous or subsequent

(s. 8 of the Evidence Act). Under illustration (i) of s. 8 it is provided for that if "A" were to be accused of a crime, the "facts that after the commission of the alleged crime he absconded … are relevant". A

[81] In the case before us, the uncanny facts of the subsequent conduct of the appellant of absconding to Kota Tinggi after having committed the offence of murder, fits perfectly with the above illustration. By so absconding to Kota Tinggi, it was obvious that the appellant had attempted to distance himself from the scene of the crime. Though that act would not suffice to convict him it would be relevant as it would be indicative of a guilty mind. In *Adikanda Das v. State of Orissa* [1988] Cri LJ 1884 Behera J had occasion to opine: B C

> The only other circumstance relied on by the prosecution was the fact of absconding of the appellant for some years. It is a settled principle of law that absconding may lend weight to the other evidence establishing the guilt of an accused, but, by itself, is hardly any evidence of guilt. The conduct of an accused making himself scarce for some period is relevant under s. 8 of the Evidence Act and may be indicative to some extent of a guilty mind, but it would not be conclusive evidence of his guilt. D E

[82] With the cumulative evidence before us, I was satisfied that the High Court had correctly found a *prima facie* case having been established, at the end of the prosecution's case. Thereafter the defence was called. F

[83] Come the defence stage, the appellant's defence was incoherent. He attempted to implicate everyone in the incident, in the like of Jumain of whom he alleged had wanted to stab him. In the earlier part of his own testimony he had exonerated Jumain's culpability when he had said: G

> Masa saya keluar pagi itu Jumain tak ada lagi diruang tamu. Masa saya bangun Shamsudin dan Jumain sudah pergi kerja (When I went out that morning Jumain was not at the lounge. When I woke up Shamsudin and Jumain had gone to work). H

[84] He also had said that the killer was "unknown to him". As the hearing went on he tried to implicate Jumain, perhaps having forgotten that he had made the above statement clarifying that Jumain had left (which tallied with Shamsudin's documented deposition affirming that he went out of the house with Jumain earlier). At the tail end of his testimony the appellant accused the now 'identifiable' Jumain as the person who wanted to stab him I

(again contradicting himself when earlier he had stated that he knew not the killer). It was thus plain and obvious that lying and switching of his stories was second nature to the appellant.

[85] Even at the early stage of the hearing ie, the prosecution's stage, he had launched his future defence when he had suggested during the cross-examination of SP9, that he had attempted to seduce the deceased with Jumain. This desperate shot in the dark approach was abandoned subsequently as this line of defence was never pursued at the defence stage.

[86] The above only defence, which merely focused on Jumain, unwittingly had absolved SP9 of any involvement with the murder. This very witness who would pin-point the appellant as the murderer thus had supplied a testimony that was beyond criticism as his credibility and neutrality was never put to the test.

[87] What was undeniable was that on that fateful day and time, by his very own admission, he was in the house when the commission of the offence was in progress. By all accounts he had ironically strengthened the prosecution's case, not merely by that admission, but also by his plainly obvious attempts to push the blame to someone else. This advertence of the defence of outright denial had unfortunately caused him to 'forget' to deal with the prosecution's other strands of evidence, thus resulting in him failing to dent the prosecution's case. He never even explained what he was doing crawling on top of the deceased with a knife in hand. He did, at one stage attempt to explain why he had stab wounds, bruises etc. all over his body, in that they were caused by the supposed amorous Jumain but I found his explanation inconsistent with the other evidence. To put it bluntly Jumain could not have caused the injuries as he was never present during the murder incident. He had already left for work as confirmed by Shamsudin's deposition, SP9's exonerating testimony, and by the appellant's very own admission that Jumain had already left for work with Shamsudin that morning.

[88] To recapitulate on the facts, the deceased together with her family had rented out one of the rooms in a 5 bedroom wooden house from SP8. Her family comprised her husband, identified by the other witnesses as Shamsuddin, and a two year old child. That left out 4 other rooms. Out of those 4 rooms, 2 rooms were left vacant whilst one was taken up by the appellant, with the other being rented out to SP9 (Ahmad Jumah), the prosecution's main witness. On that fateful day SP9 was awakened by a scream

crying out for help. Surreptitiously he had peeped through the door which was slightly ajar and saw the appellant holding a knife in the palm of his left hand. The deceased was on her back whilst he was 'crawling' (merangkak) on top of her. He also witnessed the appellant holding the deceased's neck. At that material moment the deceased was still clothed in a yellow dress, with the appellant only wrapped in a green towel but shirtless. SP9 also saw no one else at the lounge. Due to fear, and instead of going out of his room to assist the victim, he had sneaked out through the window and had run away all the way to the top of the nearby hill. Sometime later he descended and reentered the house at about 7.30am. This time the lounge was empty. In fact the house was empty except for the lifeless deceased's body which now was at the kitchen (and not in the lounge as was last seen). The deceased now was unclad except for the brassiere and underwear. Blood was seen splattered at several places. He quickly grabbed a shirt and proceeded to Jamiliah's (SP8) shop, ie, his place of employment. Even at that shop he maintained his silence. During the trial he had identified the appellant and the deceased.

[89] Though SP9 did not see the act of the appellant causing the injuries, which caused the eventual death, the cumulative effect of the total circumstantial evidence, pointed unerringly to his guilt. Waikar J in *Tulshiram v. State of Maharashtra* [1984] Cr LJ 209 had occasion to say:

> The law on circumstantial evidence is clear and we need not restate it. Suffice it to say that all the circumstances established must unerringly point to the guilt of the accused and that they must be consistent and consistent with the guilt and inconsistent with the innocence of the accused. What is important is the cumulative effect of all the circumstances.

[90] At the stage of the defence the appellant had squandered away his life when he submitted the most improbable defence in the form of mere denial and shifting the blame to Jumain. Yet all the evidence, and it was obvious to all and sundry, that Jumain was never in the house at the time of the offence. This defence format when tested against the totality of the evidence adduced by the prosecution at best was a desperate attempt by the appellant to extricate himself from an impossible position. All the evidence therefore when bound together, inclusive of the most

A innocuous strand like the return of SP9 to the house not too long thereafter, where he saw the body of the deceased in the kitchen, irresistibly pointed to the guilt of the appellant. The last person he saw with the deceased was the appellant.

B **[91]** To wind it up, from the totality of the evidence I was satisfied that at the end of the trial the prosecution had proven its case beyond reasonable doubt. I thus had no difficulty in dismissing the appeal. The conviction and sentence by the High Court are affirmed.

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